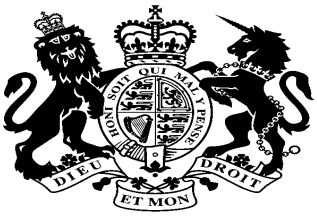

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12204/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 April 2019	**On 1 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

VIVIAN [O]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr L Youssefian (for Wimbledon Solicitors)
For the Respondent: Mr I Jarvis (Senior Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Vivian [O], a citizen of Nigeria, born 24 May 1999, against the decision of the First-tier Tribunal of 23 July 2018 dismissing her appeal, itself brought against the refusal of her human rights claim of 3 October 2017.

2. The Appellant was granted entry clearance to study in the UK on 17 September 2016. Following her arrival she made an application for indefinite leave to remain on the basis of being the adopted child of a settled parent, her aunt

[HE], a British citizen. Her aunt's husband [OE] has leave to remain until 13 April 2019.

3. The background facts to her adoption were based on her mother ([SO]) having had a severe stroke in 2005 meaning she could not move her right side, and her father being seriously injured in a car accident leaving him with brain damage. They had been reduced to destitution and lived on the streets in rural towns near Benin City. She had younger siblings who she claimed were cared for her by her grandmother, Victoria; however, Victoria did not have the capacity to care for the Appellant too. Victoria had helped with her daily care when she was younger.

4. In the UK she lived with the Sponsor, Ms [E], whose maternal aunt was the Appellant's grandmother. Ms [E] had adopted the Appellant under Nigerian law. She had broken ties with her parents subsequently.

5. Her application was refused because the Secretary of State was not satisfied that the adoption order was legally effective as only [SO] was named therein as the adopting parent, the Appellant was now aged over 18, the Sponsor was married and thus did not have sole responsibility for the Appellant's welfare, and there was no evidence that the adopting party had been assessed as eligible and suitable to adopt from overseas by an adoption agency in the UK. Nor did the evidence satisfactorily demonstrate that there were no other relatives to care for the Appellant.

6. The First-tier Tribunal noted that the Sponsor earned over £24,000 annually, had paid off her mortgage on her home, and had savings exceeding £21,000. The most relevant evidence before it given the disposition of the appeal was:

   (a) Of the adoption:

      - An undated letter from the Appellant's parents consenting to the adoption, from a city address and written after her arrival in the UK; and

      - An Order from the Magistrates Court in Nigeria of 26 October 2016 recording a magistrate making an adoption order in the Sponsor's favour.

   (b) Of the Appellant's mother's health: a letter from the management board of the Central Hospital, Benin City, of 24 August 2017, from the principal medical officer, stated the Appellant's mother was receiving physiotherapy and incapable of performing her normal duties following a stroke in 2005.

7. The Sponsor's witness statement set out that she visited Nigeria regularly to check on the welfare of the Appellant's relatives. She had visited Victoria in 2015, discovering that Victoria would contact the Appellant's parents when that was necessary by tracking them down on the streets, which could take days. The Sponsor had made the responsible decisions in the Appellant's life since

she was aged around six years old, for example insisting that she continued with her schooling when her parents wanted her to start work. The Appellant had become withdrawn and depressed since the refusal.

8. The First-tier Tribunal did not accept the historical facts advanced by the Appellant. The documents leading to the adoption order had not been produced. The Order did not mention the Appellant's father and the supporting evidence underlying that application had not been produced to the First-tier Tribunal; the Appellant and Sponsor were absent (so thought the Judge below), though a probation officer was present.

9. The medical evidence relating to the parents was of unknown provenance. The Sponsor could have found out more about the family problems in Nigeria given her frequent visits there and it was not credible that were things as bad as claimed that further enquiries would not have been made; accordingly her claim to have last had contact with them in December 2017 was not believed.

10. There were thus no serious and compelling reasons indicating that exclusion was undesirable. The nearest comparator Rule was that addressing adult dependent relatives and the Appellant's case fell far short of the care threshold therein. Given her credibility findings, the Judge did not accept there was family life between the Appellant and Sponsor. The Appellant had not lived in the UK for long and had done so over a period when her leave was precarious given she only held short-term student leave.

11. Grounds of appeal contended that

    (a) A material error of fact had been committed given that the records of the adoption hearing in fact included information which the First-tier Tribunal seemed to have overlooked;

    (b) It was not tenable to hold against the Appellant the fact that the letter from her parents bore a city address given that the letter was undated;

    (c) There had been no cross examination of the Appellant such as to make it clear the degree to which her evidence was in issue;

    (d) The Appellant had not stated she had last had contact with her parents in 2017, but in September 2016 and evidence had been overlooked as to the steps she had taken to track down her parents via enquiries of other relatives;

    (e) The Judge had made findings without an evidential basis, as where he considered it unlikely the Appellant's mother would still be receiving treatment many years after her stroke;

    (f) The existence of family life had been rejected without reference to the evidence regarding the Appellant's dependency on the Sponsor or the fact that the latter had had sole responsibility for her upbringing for a significant period.

12. The First-tier Tribunal granted permission to appeal on 10 January 2019 given the evidence indicating that the Appellant's mother may have been present at the adoption hearing.

13. Before me Mr Jarvis for the Secretary of State took a pragmatic stance, explaining that there were clearly difficulties with the reasoning of the First-tier Tribunal. Even aside from the question as to whether or not a fair procedure was adopted, there was no clear evidential basis for the finding that the Appellant's account was undermined by an undated letter giving a city address, and it was wrong to speculate as to the duration of medical treatment following a stroke. Mr Youssefian stressed that these flaws were truly fundamental ones.

Findings and reasons

14. I accept that there were indeed material errors of law in the decision of the First-tier Tribunal. It is useful to set out the relevant Immigration Rules in order to put the human rights claim in context. Although the refusal letter cited a child migration route under Appendix FM, that does not seem to be especially relevant, given that the Rules on adoption are so much more on point.

> "**Requirements for indefinite leave to remain in the United Kingdom as the adopted child of a parent or parents present and settled in the United Kingdom**
>
> **311.** The requirements to be met in the case of a child seeking indefinite leave to remain in the United Kingdom as the adopted child of a parent or parents present and settled in the United Kingdom are that he:
>
> (i) is seeking to remain with an adoptive parent or parents in one of the following circumstances:
>
> …
>
> (c) one parent is present and settled in the United Kingdom and has had sole responsibility for the child's upbringing; or
>
> (d) one parent is present and settled in the United Kingdom and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; … and
>
> (ii) has limited leave to enter or remain in the United Kingdom, and
>
> (a) is under the age of 18; or
>
> (b) if aged 18 or over, was given leave to enter or remain with a view to settlement under paragraph 315 or paragraph 316B and has demonstrated sufficient knowledge of the English language and

sufficient knowledge about life in the United Kingdom in accordance with Appendix KoLL; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated and maintained adequately without recourse to public funds in accommodation which the adoptive parent or parents own or occupy exclusively; and …

(vi)

(a) was adopted in accordance with a decision taken by the competent administrative authority or court in his country of origin or the country in which he is resident, being a country whose adoption orders are recognised by the United Kingdom; or

(b) is the subject of a de facto adoption; and

(vii) was adopted at a time when:

(a) both adoptive parents were resident together abroad; or

(b) either or both adoptive parents were settled in the United Kingdom; and

(viii) has the same rights and obligations as any other child of the adoptive parent's or parents' family; and

(ix) was adopted due to the inability of the original parent(s) or current carer(s) to care for him and there has been a genuine transfer of parental responsibility to the adoptive parents; and

(x) has lost or broken his ties with his family of origin; and

(xi) was adopted, but the adoption is not one of convenience arranged to facilitate his admission to or remaining in the United Kingdom; and

(xii) does not fall for refusal under the general grounds for refusal."

15. This was an appeal against a refusal of an application where the Appellant was a minor when she applied for further leave (on 3 April 2017). The essential issue was whether the Appellant had a viable case under these Immigration Rules, or outside them with respect to Article 8 ECHR. If she had a viable case under the Rules, then so long as she had established private and family life in the UK, her appeal would inevitably succeed: see *TZ (Pakistan) and PG (India)* [2018] EWCA Civ 1109 §35. If her case failed under the Rules, then the public policy judgments found within the Rules were likely to be relevant to her appeal's prospects outside them. As stated in *MM (Lebanon)* [2017] UKSC 10,

"although the tribunal must make its own judgment, it should attach considerable weight to judgments made by the Secretary of State in the exercise of her constitutional responsibility for immigration policy." Lord Carnwath in the Supreme Court makes the same point in *Patel* [2013] UKSC 72, stating at [55] that "the balance drawn by the rules may be relevant to the consideration of proportionality".

16. The Appellant's claim was based on her aunt having long exercised a significant degree of responsibility over her upbringing due to her parents' lack of capacity to fulfil that role themselves. As of October 2016, it was said that her aunt had formally adopted her. The Rules permit switching by a child applicant from limited leave to indefinite leave to remain (there being no particular form of leave required found in Rule 311). So two central questions requiring determination were whether the Appellant enjoyed family life with her aunt, and whether the adoption was a valid one. In both respects it seems to me that the First-tier Tribunal fell into error.

17. The decision of the Strasbourg Court in *Advic v UK* (1995) 20 EHRR CD 125 is sometimes cited for the proposition that the normal emotional ties between a parent and an adult son or daughter will not, without more, suffice to constitute family life: *Kugathas* [2003] EWCA Civ 31. Buxton LJ emphasised in *MT (Zimbabwe)* [2007] EWCA Civ 455 at [11] that *Advic*, "whilst stressing the need for an element of dependency over and above the normal between that of a parent or parent figure and adult child, also stresses that everything depends on the circumstances of each case". The Upper Tribunal President wrote in *Lama* [2017] UKUT 16 (IAC) §32 that "at its heart, family life denotes real or committed personal support between or among the persons concerned." In *AA v United Kingdom* (Application no 8000/08; 20 September 2011) the European Court of Human Rights stated that:

> "An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having 'family life'."

18. It is rather difficult to see how it is that Tribunal below found that there was no relevant family life in play. The Appellant was a minor child at the application date and she was solely cared for by the Sponsor and her husband. Whilst it may be true that the in-country Immigration Rules do not provide for continued treatment of a child applicant as if they were a minor throughout the decision making process, the entry clearance Rules do so, and in so doing demonstrate recognition by public policy that it is undesirable to let delays in processing a child's claim undermine their application.

> "27. An application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision, except that an applicant will not be refused an entry clearance where entry is sought in one of the categories contained in paragraphs 296-316 or paragraph EC-C of

> Appendix FM solely on account of his attaining the age of 18 years between receipt of his application and the date of the decision on it."

19. Rule 311(ii)(b) recognises the same policy consideration, which is apt to bear in mind when considering the proportionality of an immigration decision, particularly when considered in tandem with the recognition by the ECtHR in *AA* that a young person who has not left the family home may be regarded as enjoying family life with their cohabiting family members.

20. Furthermore, the approach of the Tribunal below to the lawfulness of the adoption proceedings is flawed by material errors. It is clear that the Appellant's mother and Sponsor were in fact named as present at the adoption hearing, and that the Order addressed the transfer of all relevant legal responsibilities to the Sponsor. Conceivably the Judge was confused by the refusal letter, which repeatedly referenced the Appellant's natural mother [SO] as being the adopting party. In any event, the adoption order does not appear to be defective in the manner suggested by the First-tier Tribunal.

21. I accordingly find that the decision of the First-tier Tribunal was legally flawed and the matter must be re-heard. Given all issues require re-determination, the appropriate forum is the First-tier Tribunal.

22. I should add that one consideration to which no overt attention was given by the First-tier Tribunal was the extent to which the Appellant's application met the UK's legal regime on the recognition of overseas adoptions. The Upper Tribunal considered the issue in *TY (Overseas Adoptions - Certificates of Eligibility)* [2018] UKUT 197 (IAC), usefully stating:

> "8. Not all foreign adoptions are recognised, that is, have legal effect in the United Kingdom. Sections 66 and 67 of the Adoption and Children Act 2002 and sections 39 and 40 of the Adoption and Children (Scotland) Act 2007 define the adoptions treated in law as having legal effect in England, Wales and Scotland (termed in the Adoption and Children Act as ' Chapter 4 adoptions'). These include certain intercountry adoptions:
>
> > (i) An adoption effected under the law of a Hague Convention country outside the British Islands, and certified in pursuance of Article 23(1) of the Convention (a "Hague Convention adoption"). The UK incorporated the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption into domestic law by the operation of the Adoption (Intercountry Aspects) Act 1999 Schedule 1 and Adoptions with a Foreign Element (Scotland) Regulations 2009/SI 182 (Scottish SI).
> >
> > (ii) An overseas adoption (as referred to in paragraph 5 above) effected under the law of a country or territory listed in the Schedule to the Adoption (Recognition of Overseas Adoptions) Order 2013 from 3 January 2014 and to the Adoption (Designation of Overseas Adoptions) Order 1973 for adoptions made from 1 February 1973 to 2 January 2014. These state that such adoptions must not be a Hague

> Convention, customary or common law adoption. This change is the underlying factor in this appellant's appeal.
>
> (iii) An adoption recognised by the law of England and Wales and effected under the law of any other country. The inherent jurisdiction invoked to recognise foreign adoptions is described in detail by Sir James Munby President in *N (A Child), Re* [2016] EWHC 3085 (Fam). We only attempt a summary: the adoptive parents must have been domiciled in the foreign country at the time of the foreign adoption; the child must have been legally adopted in accordance with the requirements of the foreign law; t he foreign adoption must in substance have the same essential characteristics as an English adoption and there must be no reason in public policy for refusing recognition."

23. Nigeria is not a Hague Convention country and nor is it a country listed in the schedule to the Adoption (Recognition of Overseas Adoptions) Order 2013. The latter difficulty represents a barrier to Rule 311(vi) being satisfied. The Sponsor has not lived abroad for an extended period with the Appellant and so this is not a de facto adoption.

24. Section 66 of the Adoption and Children Act 2002 provides for recognition of various kinds of adoption. Section 83 applies where a child is sought to be brought into the UK by a person habitually resident in the British Islands under an external adoption effected within the previous 12 months. This is likely to be the legal foundation for the point taken in the refusal letter that no relevant adoption agency approval had been demonstrated. The Adoption Agencies Regulations 2005 require the involvement of a relevant agency in section 83 cases. Indeed, as noted in *TY* at para 13:

> "The Act envisages its provisions being implemented by Regulations which may require a person intending to bring, or to cause another to bring, a child into the United Kingdom (a) to apply to an adoption agency (including a Scottish or Northern Irish adoption agency) in the prescribed manner for an assessment of his suitability to adopt the child, and (b) to give the adoption agency any information it may require for the purpose of the assessment."

25. I note that the record of proceedings indicates that the Appellant's advocate before the First-tier Tribunal submitted that the Sponsor had indeed been assessed by Lambeth Council as a suitable adoptive parent. So there may well have been an assessment compatible with the statutory regime.

26. As noted by the Advocate-General in *SM v ECO UK* (Case C-129/18), in *Chbihi and Others v. Belgium* (16 December 2014) the Strasbourg Court (citing the judgment given in *Harroudj v France*) held that "the provisions of Article 8 do not guarantee the right to found a family or the right to adopt … However, this does not rule out the possibility that States parties to the Convention may nevertheless have, in certain circumstances, a positive obligation to enable the formation and development of family ties". It added that "according to the

principles that emerge from the case-law of the Court, where the existence of a family tie with a child has been established, the State must act to enable that tie to be developed and to create legal safeguards to enable the child's integration in his family."

27. So as always, provisions of domestic law are not necessarily the last word in a case where family life is in play. There is a theme running across the Immigration Rules involving children which provides for a parent (including an adoptive one) to sponsor a child's entry and residence in the UK where they have held sole responsibility for them or where there are serious and compelling reasons rendering their exclusion undesirable.

28. These issues were not discussed before me and so it is not appropriate to do any more than draw attention to them. It will be for the First-tier Tribunal to determine the appeal in the light of these principles and the facts as it finds them to be.

Decision

The appeal is allowed to the extent it is remitted to the First-tier Tribunal for re-hearing.

Signed Date 24 April 2019

Deputy Upper Tribunal Judge Symes